

# ***Michigan's Section 404 Program***



**Department of Environmental Quality**

**Section 404 of the Federal Clean Water Act requires permits for the “discharge of dredged or fill material” into waters of the United States, including wetlands.**



**In 1979, Michigan's Wetland Protection Act was passed in part to allow Michigan to assume administration of the Section 404 permit program, eliminating the need for duplicate state / federal permits for most dredge and fill activities.**





**In 1984, Michigan became the first state, and remains one of only two states, to have received EPA approval to administer the 404 Program.**



**Permits issued by the DEQ also provide authorization under Section 404 of the Federal Clean Water Act (except in coastal areas).**

**LWMD currently authorizes about 4,000 to 6,000 projects annually under Section 404, providing the citizens of the state with a significant savings in time and cost.**



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# State level wetland regulation also provides benefits in terms of resource protection.

- É Better integration with state programs.
- É More attention to smaller wetland sites and headwaters.
- É Greater consideration of local resource concerns.





**Michigan's 404 regulatory program has served as a national model of streamlining of state, federal and local regulations for over two decades.**

# State- Federal Consistency:

By law, a state Section 404 Program must meet federal Clean Water Act standards.

É ...to protect interstate resources.

É ...to ensure a “level playing field” in the national wetland permit program.

“Any approved State Program shall, at all times, be conducted in accordance with the requirements of the [Clean Water] Act and of this Part.

While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.”

*40 CFR §233.1*



# 404 Program Review Chronology

- É **1998:** Michigan's 404 Program Review initiated by EPA
- É **2000:** Draft findings by EPA; proposed DEQ response
- É **2001:** Supreme Court decision in *SWANCC*
- É **2003:** Publication of preliminary findings in *Fed. Reg.* - response by Dir. Chester with proposed actions
- É **2004:** Acceptance by Acting RA for Region 5
- É **2005:** Review by EPA HQ
- É **2006:** Supreme Court decision – *Rapanos/Carabell*
- É **2007:** *Rapanos/Carabell* guidance

**“ With regard to MDEQ’s administration of the section 404 program... .. in general, MDEQ is doing a good job. MDEQ is operating its regulatory program in a manner consistent with the State Program Regulations....”**

***EPA Preliminary Findings.... Federal Register, January 7, 2003***



**“ Through its review of the State of Michigan’s legal authorities, EPA has determined that the State’s laws and regulations are, for the most part, consistent with section 404 of the Clean Water Act, *but has identified deficiencies in a few specific areas....*”**

***EPA Preliminary Findings.... Federal Register, January 7, 2003***

# **Michigan 404 Program Changes Proposed by the DEQ:**

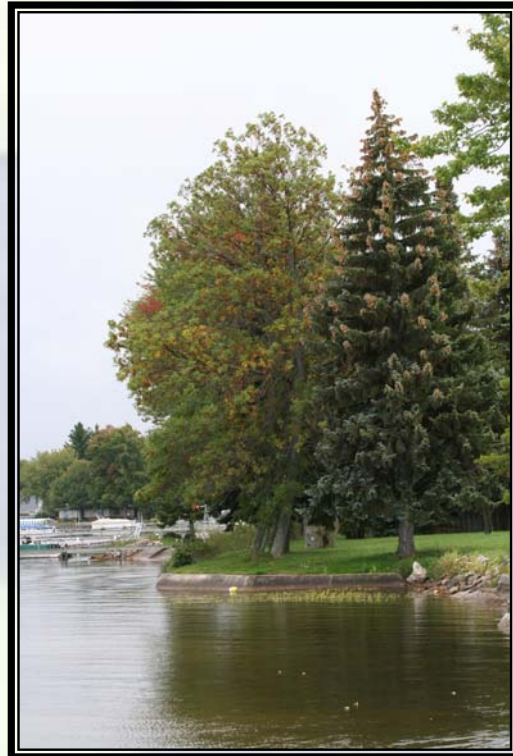
- É Administrative Actions**
- É Revision of Administrative Rules  
(301 and 303)**
- É Proposed Amendment of Part 303**
- É Updating of 404 Program MOA**



# **Administrative Actions**

- ✓ **Improved documentation of permit decisions (4/2000)**
- ✓ **Improved public notice procedures – CIWPIS on line (6/2000)**
- ✓ **Updated procedures to screen impacts to threatened and endangered (T&E) species (3/2005 draft)**
- ✓ **Completed the Part 303 Wetland Inventory (12/2006)**
- ✓ **Added certain standard permit conditions**

# ***Proposed Revision of Part 301 Administrative Rules***



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# Clarify Exemption for Drain Maintenance

**Define drain maintenance and improvement in a manner consistent with federal law, i.e. to historic width, depth, and location**



# Address Cumulative Impacts

Ensure consideration of cumulative resource impacts when evaluating new minor permit categories under Part 301.



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# Ensure Compliance with 404 (b)(1) Guidelines

Incorporate federal 404(b)(1) Guidelines by reference into permit review criteria for Part 301.





# **Other Part 301 Rule Changes:**

- É Limit term of permit to 5 years.**
- É Require signature of applicant on permit.**
- É Authorize modification of permits and define grounds for revocation of permits.**
- É Specifically require consideration of impacts to listed species.**

# ***Proposed Revision of Part 303 Administrative Rules***



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# **Evaluation of Feasible and Prudent Alternatives**

- É Administrative Rules were promulgated in April, 2000 to address EPA's concerns regarding the Department's findings on alternatives.**
- É Guidance on the application of the new rules was issued in January of 2001.**



# Clarification of exemption for road maintenance

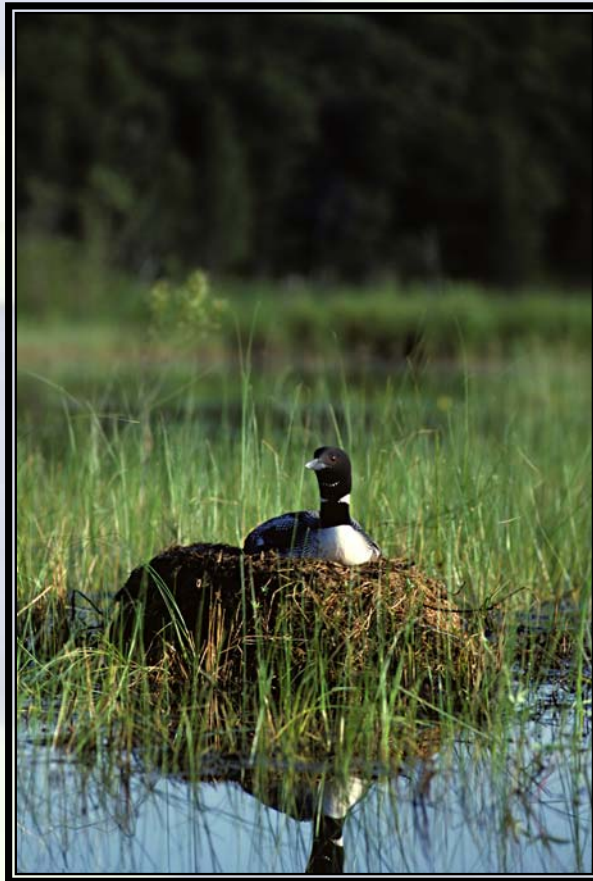
In response to a case in Oceana County, clarify that expansion of the original fill into the road right of way requires a permit where wetlands are impacted.



# **Rules changes that parallel proposed Part 301 revisions**

- É 5 year limit on permits**
- É Permit must be signed by applicant**
- É Incorporate 404(b)(1) Guidelines by reference**
- É Ensure full consideration of federally listed species**

# ***Proposed Amendments to Part 303***



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# Clarification of exemption for normal agricultural and silvicultural practices

“...plowing, irrigation, seeding, cultivation, minor drainage, harvesting, for the production of food, fiber and forest products.....” applies only to land in established use.



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# **Define exemptions for drain maintenance to be consistent with Part 301, and with Section 404**

- É Limit maintenance excavation to historic width, depth, and location. (Remove reference to “deepening, widening, and straightening)”**
- É Remove provision that allows for drainage of regulated non-contiguous wetlands for commercial production of agricultural products.**

# **Eliminate inconsistent exemptions for some utility line crossings**

- É Maintenance and repair of oil and gas pipelines**
- É Construction of pipelines less than 6 inches in diameter**
- É Construction of some power lines**

**Acceptable to replace exemptions with  
General Permits**



# Delete exemption for construction of iron and copper mine tailings basins.



The background of the slide is a soft-focus photograph of a pond. Several large, light green lily pads are scattered across the surface of the water. A single, small pink flower is visible on the right side of the image. The water has a light blue-grey hue.

# ***Revision of Section 404 Program Memorandum of Agreement***

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# **Coordination of Enforcement Procedures:**

- É DEQ will not oppose intervention by a citizen in an enforcement action when authorized by Michigan law**
- É Public notice and 30 day comment period for proposed settlement of enforcement actions filed in state court**
- É Improved coordination of enforcement actions with US EPA**



# Working with DEQ permit deadlines:



In MOA, agree that a permit issued by operation of law -- solely due to failure to meet deadlines -- is a “state only” permit.

If staff cannot ensure that 404(b)(1) guidelines are met, state cannot issue a 404 permit.

# Summary of actions not yet completed

## ➤ Revise 301 Rules

- Clarify definition of drain maintenance
- Address cumulative impacts
- Add 404(b)(1) guidelines by reference
- Permit administration (5 year time limit, signature on permit...)

## ➤ Revise 303 Rules

- Clarify exemption for road maintenance
- Add 404 (b)(1) guidelines by reference
- Permit administration (5 year time limit, signature on permit ...)

## ➤ Amend Part 303

- Clarify agricultural exemption – ongoing activities
- Limit drain maintenance to historic width, depth, location
- Replace exemption for some utility crossings with GP
- Remove inconsistent exemption for tailings basins

## ➤ Update 404 Program MOA

- Better coordination of enforcement actions
- Issuance of permits by operation of law

# **Timeframe for proposed actions – following publication of final notice in *Federal Register***

- **Revised MOA – within 6 months**
- **Administrative Rules – within 24 months**
- **Part 303 Amendments – within 36 months**
- **Administrative changes have already been completed.**



## 404 review was initiated in response to stakeholder input...



**... implementation of proposed actions will also require significant stakeholder input.**